No. 15-1498

In the Supreme Court of the United States

LORETTA E. LYNCH, ATTORNEY GENERAL, PETITIONER

v.

JAMES GARCIA DIMAYA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Respondent fails to show that Section 16(b), as incorporated in the Immigration and Nationality Act's (INA) definition of an aggravated felony, see 8 U.S.C. 1101(a)(43)(F), is unconstitutionally vague. He does not refute the fact that the concerns regarding fair notice and legislative delegation that exist in the criminal context are not present in civil removal proceedings administered by the Executive—which is why deportation statutes are subject to a less exacting vagueness standard. He does not dispute that Section 16(b) lacks critical features that led this Court to invalidate the Armed Career Criminal Act's (ACCA) residual clause in *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), see 18 U.S.C. 924(e)(2)(B)(ii), including a requirement that courts speculate about how the ordinary case of an offense played out after the crime was finished and a confusing list of enumerated offenses that made it difficult to interpret the requisite degree

of risk. And despite repeated opportunities, respondent has failed to show any significant confusion in lower courts over the meaning of Section 16(b)—certainly nothing approaching the uncertainty that plagued the ACCA's residual clause. This Court has unanimously found Section 16(b) to be clear and capable of reasoned application. *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004). It should adhere to that judgment.

A. Immigration Removal Laws Are Subject To A Less Exacting Vagueness Standard Than Criminal Laws

In deciding whether a statute is unconstitutionally vague, this Court has long "expressed greater tolerance of enactments with civil rather than criminal penalties." *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-499 (1982). That principle applies to immigration removal statutes.

1. The Due Process Clause requires that a criminal statute provide "fair warning" of the line "between lawful and unlawful conduct" and that it not "delegate" to police and prosecutors authority to decide what specific conduct is prohibited. *Hoffman Estates*, 455 U.S. at 498 (quoting *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-109 (1972)); see *Smith* v. *Goguen*, 415 U.S. 566, 575 (1974). Neither of those concerns applies to deportation.

First, as respondent concedes (Br. 52-53), deportation statutes are not subject to ex post facto limitations and thus an alien has no right to notice that his conduct may subject him to removal. See *Marcello* v. *Bonds*, 349 U.S. 302, 314 (1955) (alien had no right to be "forewarned of all the consequences of his criminal conduct" and was deportable based on a prior conviction that "was not [a] ground for deportation at the

time he committed the offense"); *Galvan* v. *Press*, 347 U.S. 522, 531 (1954); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 594 (1952). This Court's decision in *INS* v. *St. Cyr*, 533 U.S. 289 (2001) (cited at Resp. Br. 53), is not to the contrary. That case held, under ordinary principles of retroactivity, that Congress did not intend for a particular deportation provision to have retroactive effect. *Id.* at 326. The Court considered it "beyond dispute," however, that Congress could have made the statute retroactive had it wished, notwithstanding any "potential unfairness" that might result. *Id.* at 316.

Second, unlike the enforcement of criminal laws, the Nation's "policy toward aliens" is "exclusively entrusted to the political branches of government," *Harisiades*, 342 U.S. at 588-589, and "[t]he power to expel aliens * * * may be exercised entirely through executive officers," *Carlson* v. *Landon*, 342 U.S. 524, 537 (1952); see *Arizona* v. *United States*, 132 S. Ct. 2492, 2499 (2012). Congress therefore has the "unquestioned right" to authorize the Executive to remove aliens whose presence "would not make for the safety or welfare of society." *Mahler* v. *Eby*, 264 U.S. 32, 39 (1924). Although a criminal statute authorizing law enforcement to "punish[] all acts detrimental to the public interest" would be unconstitutionally vague, *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921), the same would not be true of a similar deportation statute. See, *e.g.*, 8 U.S.C. 1227(a)(4)(A)(ii) (authorizing deportation based on "criminal activity which endangers public safety or national security"); 8 U.S.C. 1227(a)(4)(C)(i) (same for alien whose presence "would have potentially serious adverse foreign policy consequences").

This Court has thus upheld broad conferrals of removal authority to the Executive Branch that likely would offend the Due Process Clause if they provided standards for criminal liability. See *Mahler*, 264 U.S. at 40 (rejecting vagueness challenge to statute authorizing deportation of specified classes of aliens whom the Secretary of Labor "finds to be undesirable"); *id.* at 41 (removal of aliens "likely to become a public charge"); cf. *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (deferring to Attorney General's judgment concerning whether offense was "political in nature"). As explained in our opening brief (at 23-24), the centralized framework under which the Attorney General and Secretary of Homeland Security exercise that discretion helps to ensure consistent interpretations.[1]

The fact that deportation carries "severe consequences" (Resp. Br. 44) does not call for a different conclusion. Deportation "may visit great hardship on the alien," *Fiswick* v. *United States*, 329 U.S. 211, 222 n.8 (1946), and has been termed a "penalty," *Padilla* v. *Kentucky*, 559 U.S. 356, 365-366 (2010). But deportation "is not a punishment" for a crime and is adminis-

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[1] Contrary to respondent's assertion (Br. 55), the administrative removal provisions of 8 U.S.C. 1228(b) and 8 C.F.R. 238.1(b) do not undermine the uniformity of Executive Branch decisionmaking. In conducting those proceedings, the Department of Homeland Security is bound by decisions of the Attorney General and Board of Immigration Appeals "with respect to all questions of law." 8 U.S.C. 1103(a)(1); see 8 C.F.R. 1003.1(d)(1) and (g). Nor does this case involve the admissibility or exclusion of aliens, or forms of discretionary relief such as cancellation of removal or voluntary departure. See 8 U.S.C. 1229b and 1229c. In those settings Congress may vest the Executive with exceptionally broad authority and discretion under general statutory terms. See *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982); Pet. Br. 28 n.4.

tered by the Executive through mechanisms that channel discretion and yield interpretations that control the administrative removal process and, in appropriate circumstances, call for deference by the courts. *Mahler*, 264 U.S. at 39; see *Arizona*, 132 S. Ct. at 2499; *Aguirre-Aguirre*, 526 U.S. at 425; *Carlson*, 342 U.S. at 537. Deportation therefore does not implicate the same concerns about notice and the potential for undue delegation to law enforcement and courts that can arise under a criminal statute. As this Court made clear in *Hoffman Estates*, those differences are critical in determining how the Due Process Clause applies. 455 U.S. at 498-499.

2. Contrary to respondent's argument (Br. 38-41), applying a less exacting vagueness standard to deportation provisions would not require this Court to "overrule" *Jordan* v. *DeGeorge*, 341 U.S. 223 (1951). As explained in our opening brief (at 19-20), the vagueness issue in *Jordan* "was not raised by the parties nor argued before th[e] Court." 341 U.S. at 229; cf. *Johnson*, 135 S. Ct. at 2562-2563. And because the Court concluded that the deportation provision in that case was constitutional under the standard applicable to criminal laws, it had no need to decide—and did not address—whether a less stringent standard would also be appropriate. *Id.* at 231. *Jordan* simply does not bear the weight respondent ascribes to it.

Nor does the government's position conflict with *A.B. Small Co.* v. *American Sugar Refining Co.*, 267 U.S. 233 (1925) (cited at Resp. Br. 25). That case concerned a statute that imposed civil and criminal penalties on anyone who charged an "unjust or unreasonable" rate for "dealing in or with any necessaries." *Id.* at 238. This Court had held in *L. Cohen Grocery*

that the statute was void for vagueness in criminal cases, 255 U.S. at 89, and it held in *A.B. Small* that the statute was also vague in civil proceedings, 267 U.S. at 239. But the Court's explanation in the two cases was different: the Court invalidated the provision in *L. Cohen Grocery* because it failed "to inform persons * * * of the nature and cause" of the offense, 255 U.S. at 89, and invalidated the statute's application to civil proceedings in *A.B. Small* by explaining that *L. Cohen Grocery* actually found the statute completely "unintelligible" and "so vague and indefinite as really to be no rule or standard at all," 267 U.S. at 239-240 (citation omitted). Far from "*eliminating* the distinction between civil and criminal vagueness standards" (Resp. Br. 42), *A.B. Small* reflects that distinction and shows that a statute that is vague in a criminal setting may also be so "unintelligible" as to be vague in a civil one. 267 U.S. at 239-240.

Finally, there is no merit to respondent's contention (Br. 41-43) that applying a less exacting vagueness standard to Section 16(b) in civil deportation cases is inconsistent with the principle that a statute means the same thing in all its applications. See *Clark* v. *Martinez*, 543 U.S. 371, 382 (2005). The government does not contend that Section 16(b) means different things in civil and criminal cases. Nor does the government dispute the related proposition (Resp. Br. 43) that, because Section 16(b) is a provision of Title 18, the rule of lenity furnishes a mechanism for resolving ambiguities in the statutory text in both the criminal and civil contexts. See *Leocal*, 543 U.S. at 11 n.8. But that does not exclude the possibility that some applications will be constitutional while others will

not. Congress, for example, can apply grounds for deportation retroactively, see *St. Cyr*, 533 U.S. at 316-317, *Marcello*, 349 U.S. at 314, but it is prohibited by the Ex Post Facto Clause from imposing retroactive criminal liability for the same conduct, see *Peugh* v. *United States*, 133 S. Ct. 2072, 2081 (2013). So too a statute that identifies in general terms categories of aliens who are subject to deportation because their presence is contrary to the safety or welfare of society, *Mahler*, 264 U.S. at 40-41, might be void for vagueness if the same standard were applied to impose criminal punishment for primary conduct. There is nothing incongruous in treating a statute's civil and criminal applications differently for constitutional purposes, even if the operative language is the same.

B. Regardless, Section 16(b) Is Constitutional Under The Vagueness Standard Applicable To Criminal Laws

In *Johnson*, this Court identified "[t]wo features" of the ACCA's residual clause that together "conspire[d] to make it unconstitutionally vague." 135 S. Ct. at 2557. First, the residual clause created "uncertainty about how to estimate the risk posed by a crime." *Ibid.* That uncertainty arose from a combination of factors, including the requirement that courts conduct an "ordinary case" analysis and, "[c]ritically," the requirement that judges "imagine how the idealized ordinary case of the crime subsequently plays out." *Id.* at 2557-2558. Second, the residual clause created "uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id.* at 2558. That uncertainty, too, arose from several factors, including the "imprecise 'serious potential risk' standard" and the linkage between the residual clause and the ACCA's "confusing list of examples." *Id.* at 2558,

2561. The Court held that, even if the various "uncertainties in the residual clause may be tolerable in isolation," *"their sum"* made the statute vague. *Id.* at 2560 (emphasis added; citation omitted).

Rather than apply *Johnson*'s careful statutory analysis, respondent picks the parts he favors and ignores the rest. He focuses on two things that Section 16(b) and the ACCA's residual clause have in common—the need to determine the "ordinary case" of a crime and to apply a standard of risk (Br. 13-20)—and dismisses the many features they do not share as "minor differences" (Br. 9) or unimportant "textual quiddities" (Br. 21). That is not a faithful application of *Johnson*'s holding.[2]

1. Section 16(b) does not create the same "uncertainty about how to estimate the risk posed by a crime"

a. Contrary to respondent's assertion (Br. 14-17), *Johnson* did not hold that requiring courts to determine the "ordinary case" of a crime, without more, generates intolerable confusion about the risk the offense entails. 135 S. Ct. at 2557. Rather, the "[c]ritical[]" problem in *Johnson* was that the ACCA's residual clause required a court to look beyond the conduct constituting the crime and "imagine how the idealized ordinary case of the crime *subsequently plays out*," including whether the offender "might

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[2] The government's position here is not contrary to its position in *Johnson*. See Resp. Br. 1, 13. The government explained in *Johnson* that, *if* the Court were to adopt the "central objection" to the residual clause advanced by the petitioner in that case—essentially the same argument respondent makes here—then it would call Section 16(b) into question. See U.S. Supp. Br. at 22-23, *Johnson*, *supra* (No. 13-7120). The Court's decision in *Johnson* rested on different, and more limited, reasoning.

engage in violence *after*" completing the offense. *Id.* at 2557-2558 (first emphasis added). That inquiry, the Court explained, was "speculative" and "detached from statutory elements." *Id.* at 2558. As a result, courts had to envision whether the ordinary case of a crime could lead to injury at some indeterminate point in the future, leading to significant uncertainty over whether, say, drunk driving or possession of a sawed-off shotgun qualified. See *id.* at 2559; *Begay* v. *United States*, 553 U.S. 137, 156-158, 161-162 (2008) (Alito, J., dissenting).

Section 16(b) presents no such uncertainty. That section requires that an offense, "by its nature," involve a substantial risk that "physical force" may be "used in the course of committing the offense." As explained in our opening brief (at 31-38), that language mitigates the concerns underlying *Johnson*'s holding by focusing attention on the risk that physical force would be used during the commission of the crime itself, without the need to speculate about subsequent injuries that might bear a causal relationship to the crime. *Leocal*, 543 U.S. at 9; see *id.* at 10 n.7 (explaining that Section 16(b) "plainly does not encompass all offenses which create a 'substantial risk' that injury will result from a person's conduct," and distinguishing a provision of the Sentencing Guidelines identical to the ACCA's residual clause). Thus, as the Court determined in *Leocal*, Section 16(b), like the elements clause of Section 16(a), covers "a category of violent, active crimes." *Id.* at 11.

Courts conducting this analysis are faced with a much simpler task than the one they faced under the ACCA's residual clause. First, a court must identify the elements of the offense at issue. If those elements

require "the use, attempted use, or threatened use of physical force against the person or property of another," the offense qualifies as a crime of violence under Section 16(a). If the elements do not require force, but, "by [their] nature," are ordinarily accomplished through acts that pose a substantial risk of the use of physical force, then the offense qualifies under Section 16(b).

In making the latter determination, courts need only conduct a type of inquiry that they are already accustomed to performing under the categorical approach: consult the elements of the statute and the body of judicial decisions interpreting and applying those elements. See *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1684-1685 (2013) (explaining that categorical approach "is not an invitation to apply 'legal imagination,'" and thus courts must consult judicial decisions to establish whether there is "a realistic probability, not a theoretical possibility," that certain conduct would come within statute) (quoting *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 193 (2007)); cf. *Mathis* v. *United States*, 136 S. Ct. 2243, 2256-2257 (2016) (courts may consult judicial decisions and trial records to determine whether statutory alternatives are elements or means); *Taylor* v. *United States*, 495 U.S. 575, 590-599 (1990) (surveying state statutes and judicial decisions to define "generic" burglary). That inquiry is far narrower and more concrete than the butterfly-effect analysis required by the ACCA's residual clause.

Of course, like statutes requiring a categorical approach, Section 16(b) may not always yield a precise and predictable answer. But *Leocal* provides the solution to that problem: a "lack[of] clarity" regard-

ing whether a particular crime qualifies under Section 16 should be resolved in the defendant's (or alien's) favor under ordinary principles of lenity. 543 U.S. at 11 n.8. It does not mean the statute is unconstitutionally vague.

b. Respondent's arguments to the contrary are not persuasive. He argues (Br. 16, 22-23), for example, that burglary presents a difficult case under Section 16(b) because the risk of physical force against a person may not arise until after breaking and entering is complete. But respondent ignores the fact that, unlike the ACCA, Section 16(b) requires a substantial risk that force will be used against a "person *or property*" (emphasis added). Respondent does not dispute that burglary ordinarily poses a risk of force to property.

In any event, respondent is simply wrong to assert (Br. 22-23) that "[t]he elements of generic burglary are satisfied upon unlawful entry with bad intent," making any confrontation between burglar and occupant occurring after entry "remote from the criminal act." Burglary involves "an unlawful or unprivileged entry into, *or remaining in*, a building or other structure, with intent to commit a crime." *Taylor*, 495 U.S. at 598 (emphasis added). A burglary thus continues throughout an intruder's unlawful presence with the requisite criminal intent, and any risk of confrontation during that period is in the course of, not after, the crime. See *United States* v. *Priddy*, 808 F.3d 676, 685 (6th Cir. 2015); *United States* v. *Bonilla*, 687 F.3d 188, 192-194 (4th Cir. 2012), cert. denied, 134 S. Ct. 52 (2013); see also *People* v. *Ramirez*, 93 Cal. App. 3d 714, 726 (1979) (same for California burglary).

Indeed, this Court has identified burglary as the "classic example" of a crime that, "by its nature," fits

within Section 16(b). *Leocal*, 543 U.S. at 10; see S. Rep. No. 225, 98th Cong., 1st Sess. 307 (1983) (stating that Section 16(b) would cover "offenses such as burglary"). Respondent presents no reason to doubt that judgment. Instead, his real objection (Br. 14-16) is that the California burglary statute under which he was convicted might not qualify because it differs from "traditional burglary." See *Descamps* v. *United States*, 133 S. Ct. 2276, 2282 (2013) (noting that California's statute is different from "most burglary laws" because it covers authorized entries). But even if that were so, the fact that a particular state statute may not qualify as a crime of violence hardly suggests that Section 16(b) is vague.

Section 16(b) also provides greater clarity concerning the offenses it does *not* cover. Consider drunk driving. It is true, as respondent notes (Br. 27), that this Court concluded that drunk driving was not covered in both *Begay* and *Leocal*. *Begay*, however, did so only by construing the ACCA to require that residual-clause offenses be "purposeful, violent, and aggressive," 553 U.S. at 145, an extra-textual requirement that four Justices rejected and that the Court largely repudiated three years later in *Sykes* v. *United States*, 564 U.S. 1, 13 (2011). *Leocal*, in contrast, was a unanimous decision that simply followed the "ordinary or natural" meaning of Section 16(b). 543 U.S. at 10; see *id.* at 11 ("In no 'ordinary or natural' sense [does] a person risk[] having to 'use' physical force against another person in the course of operating a vehicle while intoxicated."); *id.* at 10 n.7 ("The risk that an accident may occur when an individual drives while intoxicated is simply not the same thing

as the risk than the individual may 'use' physical force against another in committing the DUI offense.").

Respondent notes (Br. 22) that some courts have interpreted Section 16(b) to include inchoate offenses such as conspiracy and attempt, which he argues is inconsistent with requiring a substantial risk that the elements of the crime will be committed in a forceful manner. In the immigration context, however, conspiracies and attempts to commit crimes of violence under Section 16(b) are specifically included in the INA's definition of an aggravated felony. See 8 U.S.C. 1101(a)(43)(U). The only non-immigration case respondent cites focused on the risk of force during the commission of the crime itself. See *United States* v. *Aragon*, 983 F.2d 1306, 1313 (4th Cir. 1993) (attempting to aid escape of a federal prisoner "intrinsically" presents a substantial risk that force will be used "against some person or some property" during the attempt).

Respondent also cites (Br. 22) cases concerning whether solicitation offenses qualify as aggravated felonies. See *Prakash* v. *Holder*, 579 F.3d 1033, 1036-1037 (9th Cir. 2009); *Ng* v. *Attorney Gen.*, 436 F.3d 392, 397 (3d Cir. 2006). Those cases present two straightforward questions of statutory interpretation: whether solicitation comes within the INA's inchoate-offense provision, *Prakash*, 579 F.3d at 1038, and, if not, whether a risk of force arising after solicitation is complete nonetheless occurs "in the course of" the offense, *id.* at 1037. In holding that a risk of force may arise after a solicitation offense is complete, *Prakash* and *Ng* arguably misinterpreted Section 16(b)'s "in the course of" language. But that does not mean the statute is vague; at most, it merely demonstrates

the need for the clarifying construction the government has proposed, which is consistent with the ordinary and natural meaning of Section 16(b) and avoids constitutional concerns. See *Skilling* v. *United States*, 561 U.S. 358, 412 (2010).

Finally, respondent argues (Br. 25-27) that Section 16(b) is unconstitutionally vague because some courts purportedly disagree about whether physical force must be "violent" and whether reckless conduct qualifies. But neither of those issues has anything to do with the categorical risk analysis that supposedly makes Section 16(b) vague. Rather, they involve ordinary questions of statutory interpretation that would also arise under Section 16(a) (a provision equivalent to the ACCA's elements clause, which *Johnson* did "not call into question," 135 S. Ct. at 2563) and similar statutes. See *Voisine* v. *United States*, 136 S. Ct. 2272, 2279 (2016) (holding that "use * * * of physical force" in 18 U.S.C. 921(a)(33)(A) includes reckless conduct); *United States* v. *Castleman*, 134 S. Ct. 1405, 1410 (2014) (holding that "physical force" in same statute includes "offensive touching"). Respondent states no reason why resolving such questions would be any more difficult under Section 16(b) than it was in *Voisine* and *Castleman*.

2. Section 16(b) does not create the same "uncertainty about how much risk it takes for a crime to qualify" as a crime of violence

Respondent contends (Br. 17-20) that Section 16(b)'s "substantial risk" standard is no more precise than the "serious potential risk" standard contained in the ACCA's residual clause, and thus both statutes are equally vague. Respondent is incorrect.

As explained in our opening brief (at 39-40), a major problem this Court encountered in interpreting the residual clause was the textual link between the "serious potential risk" standard and the enumerated offenses (burglary, arson, extortion, and use of explosives) that preceded it. In the span of four years, the Court vacillated between construing the residual clause to require that "the risk posed by [a given offense be] comparable to that posed by its closest analog among the enumerated offenses," *James* v. *United States*, 550 U.S. 192, 203 (2007); to construing the list of offenses as "illustrat[ing] the *kinds* of crimes that fall within the [residual clause's] scope" as well as the "degree of risk posed," *Begay*, 553 U.S. at 142-143 (emphasis added); and then back again, *Sykes*, 564 U.S. at 15. See *Johnson*, 135 S. Ct. at 2558-2559. Members of this Court repeatedly noted that the enumerated offenses made it "difficult[]" to interpret the "serious potential risk" standard because those offenses were "far from clear in respect to the degree of risk each poses." *Begay*, 553 U.S. at 142-143; see *Sykes*, 564 U.S. at 29, 34 (Scalia, J., dissenting); *James*, 550 U.S. at 229 (Scalia, J., dissenting).

Johnson explained that, by tethering the "serious potential risk" standard to the "confusing list of examples," the residual clause created great uncertainty about the amount of risk required: the listed offenses were "far from clear in respect to the degree of risk each poses," and thus courts were forced to make "unpredictab[le] and arbitrar[y]" judgments about whether the ordinary case of a given offense was as risky as an enumerated one. *Id.* at 2558 (citation omitted). The Court specifically distinguished other statutes that use terms like "substantial risk" in part

because they do not "link[that] phrase * * * to a confusing list of examples." *Id.* at 2561. Although the Court in *Johnson* also distinguished statutes that apply a "substantial risk" standard to real-world conduct, *ibid.*, Justice Scalia had earlier explained that the absence of enumerated offenses was the "crucial" difference between the residual clause and "other criminal prohibitions [that] refer to the degree of risk posed by a defendant's conduct." *Sykes*, 564 U.S. at 35 (Scalia, J., dissenting) (citation omitted); cf. *United States* v. *Hill*, 832 F.3d 135, 146 (2d Cir. 2016) (noting that "the presence of the[] enumerated offenses was * * * the prime cause of uncertainty in [the residual clause] and the key obstacle to consistent judicial construction").

Respondent not only ignores this history, but attempts to rewrite it, claiming (Br. 28-29) that the enumerated offenses made the residual clause *less* vague and that their absence from Section 16(b) makes that provision *more* vague in comparison. *Johnson* refutes that argument. See 135 S. Ct. at 2561 ("The phrase 'shades of red,' standing alone, does not generate confusion or unpredictability; but the phrase 'fire-engine red, light pink, maroon, *navy blue*, or colors that otherwise involve shades of red' assuredly does so.") (citation omitted). So does *Leocal*, which "had little trouble interpreting" Section 16(b) "absent such a confounding list of inconsistent enumerated offenses." *Hill*, 832 F.3d at 147 n.16 (citing *Leocal*, 543 U.S. at 11).[3]

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[3] Respondent notes (Br. 28-29) that the government argued in *Johnson* that the list of enumerated offenses made the residual clause less vague. See U.S. Supp. Br. at 29-31, *Johnson*, *supra*

3. Respondent greatly overstates the difficulties in applying Section 16(b)

a. Respondent fails to show that Section 16(b) has generated anywhere near the amount of confusion that the ACCA's residual clause did. *Johnson* is the direct result of "this Court's repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause," which "confirm[ed] its hopeless indeterminacy." 135 S. Ct. at 2558. By contrast, this Court has interpreted Section 16(b) only once in the statute's history and unanimously found it to be clear and capable of reasoned application. See *Leocal*, 543 U.S. at 10-11. Respondent identifies no judge in any court who expressed concern that Section 16(b) was unconstitutionally vague before *Johnson*.[4] Respondent admits (Br. 33 n.8) that the first circuit conflict identified in his brief in opposition to certiorari (at 26, concerning unauthorized use of a motor vehicle) does not exist. And despite his assertion (Br. 31) that conflicts "abound" over whether specific offenses qualify under Section 16(b), he identifies only three—none of which survives scrutiny.

First, respondent asserts (Br. 31) that two courts of appeals have held that burglary of a vehicle satisfies Section 16(b), see *Escudero-Arciniega* v. *Holder*, 702 F.3d 781, 784-785 (5th Cir. 2012) (New Mexico

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(No. 13-7120). But the Court rejected that argument, see 135 S. Ct. at 2558, and that ruling controls here.

[4] Respondent cites (Br. 34) Judge Calabresi's concurring opinion in *Vargas-Sarmiento* v. *United States Department of Justice*, 448 F.3d 159 (2d Cir. 2006), as stating that some Section 16(b) cases were "somewhat difficult to reconcile," but fails to note that Judge Calabresi found the crime at issue (New York first-degree manslaughter) to "fit[] very easily" within Section 16(b). *Id.* at 176.

offense); *United States* v. *Guzman-Landeros*, 207 F.3d 1034, 1035 (8th Cir. 2000) (per curiam) (Texas offense), but the Ninth Circuit has disagreed, see *Sareang Ye* v. *INS*, 214 F.3d 1128, 1130 (2000) (California offense). There is no conflict. As the Ninth Circuit explained in *Sareang Ye*, the California offense of burglary of a vehicle (like burglary of a structure) is unlike similar crimes in other States because it "does not require an unprivileged or unlawful entry" and thus is less likely to involve force. 214 F.3d at 1133-1134 (noting that offender could use a borrowed key to unlock vehicle). The constitutionality of Section 16(b) does not depend on whether California's assertedly "oddball" burglary statute (Br. 19) fits within it.

Second, respondent contends (Br. 32) that five circuits disagree about whether statutory rape is a crime of violence. As with burglary of a vehicle, the decisions he cites primarily reflect differences in how States define that offense, not uncertainty over how Section 16(b) should apply. In *Valencia* v. *Gonzales*, 439 F.3d 1046 (2006), for example, the Ninth Circuit held that Section 16(b) did not cover a California statute that criminalized "consensual sexual intercourse with a minor between the ages of seventeen and eighteen." *Id.* at 1050. The court distinguished other cases, including *Chery* v. *Ashcroft*, 347 F.3d 404 (2d Cir. 2003), and *United States* v. *Velazquez-Overa*, 100 F.3d 418, 422 (5th Cir. 1996), cert. denied, 520 U.S. 1133 (1997), that involved statutes prohibiting sexual intercourse with younger children or incapacitated victims. See 439 F.3d at 1050. The other cases respondent cites are similarly offense-specific. See *Aguiar* v. *Gonzales*, 438 F.3d 86, 89-90 (1st Cir. 2006) (addressing statute prohibiting adult from having sexual inter-

course with child under age 16), cert. denied, 549 U.S. 1213 (2007); *Xiong* v. *INS*, 173 F.3d 601, 607 (7th Cir. 1999) (applying version of modified categorical approach to determine that offense involved "consensual sex between a boyfriend and his fifteen year old girlfriend," but noting that crime involving a "substantial age difference" would likely be a crime of violence); cf. *Patel* v. *Ashcroft*, 401 F.3d 400, 408-411 (6th Cir. 2005) (noting widespread agreement that various state sex offenses qualify under Section 16(b)).[5]

Third, respondent argues (Br. 32-33) that courts disagree concerning the treatment of "[e]vading arrest." He cites only two cases, however, involving very different statutes. *Dixon* v. *Attorney General*, 768 F.3d 1339 (11th Cir. 2014), concerned the Florida offense of "aggravated fleeing," which makes it a crime to cause injury to a person or damage to property while fleeing the scene of a car accident in willful disregard of an officer's command to stop. *Id.* at 1343. In *Flores-Lopez* v. *Holder*, 685 F.3d 857 (2012), in contrast, the Ninth Circuit interpreted a California statute that made it a crime to "resist[]" an officer with only a "*de minimis* [amount of] force." *Id.* at 864. Given the important differences between those offenses, it is hardly surprising (and entirely appro-

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[5] Any interpretive issues posed by statutory rape are not unique to Section 16(b). In *Esquivel-Quintana* v. *Lynch*, cert. granted, No. 16-54 (oral argument scheduled for Feb. 27, 2017), for example, this Court will consider whether certain statutory rape offenses qualify as "sexual abuse of a minor" in the INA's definition of an aggravated felony. See 8 U.S.C. 1101(a)(43)(A).

priate) that courts have reached different conclusions about whether they are covered by Section 16(b).[6]

If Section 16(b)'s categorical risk analysis were as standardless as respondent claims, he should have no trouble identifying conflicts reflecting that supposed defect. The fact that he has failed to identify a *single* genuine conflict of that sort throughout this litigation is telling—as is the fact that this Court has had cause to interpret the statute only once in 30 years. Respondent engages in a great deal of unfounded speculation about why this may be so,[7] but the answer is simple: Section 16(b) is not vague.

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[6] The National Immigration Project cites (Amicus Br. 12) another evading-arrest case, *Penuliar* v. *Mukasey*, 528 F.3d 603 (2008), but acknowledges that the Ninth Circuit later overruled it. In any event, the statute in *Penuliar* made it a crime to commit traffic violations while fleeing, not to cause injury or damage to persons or property. *Id.* at 609. Amicus also asserts circuit conflicts over residential trespass (Br. 7) and unlawful imprisonment (Br. 12-14), but neither reflects confusion over the meaning of Section 16(b). The principal divergence in the residential trespass cases was how closely the statutes at issue related to burglary. See *Zivkovic* v. *Holder*, 724 F.3d 894, 906 (7th Cir. 2013); *United States* v. *Venegas-Ornelas*, 348 F.3d 1273, 1278 (10th Cir. 2003), cert. denied, 543 U.S. 986 (2004). The "unlawful imprisonment" cases involved very different types of crimes. Compare *United States* v. *Franco-Fernandez*, 511 F.3d 768, 769 (7th Cir. 2008) (concealing child from custodial parent), and *Dickson* v. *Ashcroft*, 346 F.3d 44, 47 (2d Cir. 2003) (same), with *Delgado-Hernandez* v. *Holder*, 697 F.3d 1125, 1127 (9th Cir. 2012) (kidnapping by force or fear).

[7] Respondent's assertion (Br. 35-36) that Section 16 does not generate many appealable decisions is wrong. Respondent cites 42 such cases in his brief, and his amici cite many more. The Ninth Circuit alone has issued dozens of decisions applying Section 16(b) since 2006. Nor does it matter (Br. 36-37) that, prior to *Johnson*, some courts looked to ACCA residual clause cases when construing Section 16(b), and vice versa. Those decisions were grounded

b. In any event, disagreements "about whether [Section 16(b)] covers this or that crime" do not indicate that the statute is vague. *Johnson*, 135 S. Ct. at 2560. "[E]ven clear laws produce close cases," *ibid.*, and this Court has consistently refused to invalidate statutes merely because "it may be difficult" to apply the statute at the margins, *United States* v. *Williams*, 553 U.S. 285, 306 (2008). See, *e.g.*, *Skilling*, 561 U.S. at 403-404 & n.36 (rejecting vagueness challenge despite circuit conflict concerning statute's scope); *Posters 'N' Things, Ltd.* v. *United States*, 511 U.S. 513, 515, 526 & n.4 (1994) (same). As explained above and in our opening brief (at 41-42), many crimes clearly fall within Section 16(b)—generic burglary being a "classic example," *Leocal*, 543 U.S. at 10—and have generated no disagreement among the circuits. A criminal statute is unconstitutionally vague only if it "simply has *no* core." *Smith*, 415 U.S. at 578. That does not describe Section 16(b).

4. Invalidating Section 16(b) would call into question the constitutionality of other statutes

Respondent contends (Br. 56-58) that invalidating Section 16(b) would not affect other provisions of federal law because those statutes do not employ the categorical approach. That is incorrect. As respondent concedes (Br. 43), a statute means the same thing in all its applications, see *Clark*, 543 U.S. at 382, and thus statutes that incorporate Section 16(b)'s definition of a crime of violence also incorporate its ordinary-case requirement. See Pet. Br. 53 & n.10 (citing statutes).

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in the belief that the residual clause was as capable of reasoned application as Section 16(b). *Johnson* rejected that assumption.

Respondent focuses specifically on 18 U.S.C. 924(c)(3)(B), which is worded identically to Section 16(b), as an example of a statute that does not require a categorical approach. As explained in our certiorari-stage reply brief (at 9-10 & n.1), most circuits have rejected that argument, including after *Johnson*. See, *e.g.*, *United States* v. *Cardena*, 842 F.3d 959, 997 (7th Cir. 2016); *United States* v. *Prickett*, 839 F.3d 697, 698 (8th Cir. 2016), petition for cert. pending, No. 16-7373 (filed Jan. 3, 2017); *Hill*, 832 F.3d at 139, 146.[8]

Section 924(c) may nonetheless be distinguishable. See Pet. Br. 53 n.11. But the fundamental point here is that Section 16(b) lacks many of the ACCA residual clause's problematic features and has not generated anything close to the confusion that dogged the residual clause for years. It is not vague.

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For the reasons stated above and in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

IAN HEATH GERSHENGORN
Acting Solicitor General

JANUARY 2017

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[8] Two circuit courts have suggested that Section 924(c)(3)(B) may be distinguishable, both in dicta. See *United States* v. *Robinson*, No. 15-1402, 2016 WL 7336609, at *2 n.5 (3d Cir. Dec. 19, 2016); *Shuti* v. *Lynch*, 828 F.3d 440, 449 (6th Cir. 2016).